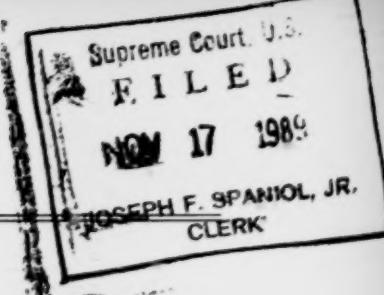


No. 89-573



In The
Supreme Court of the United States
October Term, 1989

BOB HERBERT & ASSOCIATES, INC.,

Petitioner,

vs.

KING MANUFACTURING & SALES, INC.

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF INTERVENOR GRANT SQUARE
BANK & TRUST COMPANY IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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November 21, 1989



QUESTIONS PRESENTED

1. IS A SETTLEMENT JUDGMENT RENDERED BY A FEDERAL DISTRICT COURT SUBJECT TO BANKRUPTCY RULE 9019 APPROVAL WHERE THE DEBTOR IN POSSESSION SUES UNDER BANKRUPTCY RULE 6009?
2. IN SUCH A SUIT, MAY THE DEFENDANT ASSERT A COUNTERCLAIM WITHOUT FIRST OBTAINING AN ORDER LIFTING THE 11 U.S.C. SECTION 362 AUTOMATIC STAY?
3. IS BOSTICK DISTINGUISHABLE ON THE FACTS?
4. CAN A CREDITOR HOLDING A SECURED CLAIM, NOT A PARTY TO THE SETTLEMENT JUDGMENT, BUT WITH A CONSTRUCTIVE KNOWLEDGE OF IT AND IN PRIVITY WITH THE DEBTOR, INTERVENE IN THE DISTRICT COURT FOURTEEN MONTHS AFTER JUDGMENT, AND AFTER THE CLAIM HAS BEEN ABANDONED TO THE CREDITOR BY THE TRUSTEE AND IS NO LONGER PROPERTY OF THE ESTATE, TO SET ASIDE THE JUDGMENT ON THE GROUND IT LACKED RULE 9019 APPROVAL?
5. IN THIS SITUATION, DOES THE BANKRUPTCY COURT HAVE JURISDICTION ON REMAND?

LIST OF INTERESTED PARTIES

1. BOB HERBERT & ASSOCIATES, INC., Houston, Texas, Petitioner.
2. GERALD E. HOPKINS, 4920 Center, Houston, Texas, Attorney for Petitioner.
3. TERRY T. WIENS, 3015 N.W. 59th Street, Oklahoma City, Oklahoma, Attorney for Petitioner.
4. KING MANUFACTURING & SALES, INC., Oklahoma City, Oklahoma, Respondent.
5. GEARY L. WALKE, 3904 East Reno, Oklahoma City, Oklahoma, Attorney for Respondent in the U.S. District Court, Western District of Oklahoma.
6. GRANT SQUARE BANK & TRUST COMPANY, Oklahoma City, Oklahoma, Intervenor.
7. THOMAS S. BALA, 501 N.W. Expressway, Suite 220, Oklahoma City, Oklahoma, Attorney for Intervenor. The caption does not reveal the name of the Intervenor.

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PETITION FOR WRIT OF CERTIORARI**

The Intervenor, Grant Square Bank & Trust Company, real party in interest, respectfully submits that the Petition for Writ of Certiorari should be denied.

STATUTES INVOLVED

The pertinent statutes involved in this case are 28 U.S.C. §1334 (bankruptcy jurisdiction); 11 U.S.C. §362 (automatic stay); Rule 24, F.R.C.P. (intervention); Rule 60,

F.R.C.P. (relief from judgment or order); Bankruptcy Rule 6009 (prosecution of claims by debtor); Bankruptcy Rule 9019 (compromise).

STATEMENT OF THE CASE

Intervenor herein adopts as their Statement of the Case the facts set out by the Tenth Circuit Court of Appeals in its unpublished decision of June 27, 1989 (No. 88-2148), set forth herein.

"The facts in this case are undisputed. King Manufacturing & Sales, Inc. (King) granted to Bank a secured interest in certain accounts receivable, including one in the amount of \$40,000.00 owing from Appellant Herbert. King then filed a Petition for Chapter 11 bankruptcy. Subsequently, and with counsel different from his bankruptcy counsel, King sued Herbert in the United States District Court to collect the account receivable. The record in that case bears no indication that King was in bankruptcy. In the action on the account, King and Herbert entered into a settlement agreement which essentially provided the parties would continue to do business with one another until a certain amount of gross had been achieved. Herbert would take no commission, and thus King would be made whole. The parties also agreed that \$25,000.00 rather than \$40,000.00 was the amount due. At no time did Bank receive notice of the settlement agreement. Further, the Bankruptcy Court did not approve the settlement.

After King and Herbert achieved their settlement, and as a part of the agreement, the parties entered a

dismissal of the action with prejudice. Subsequently, the Bankruptcy Court converted the Chapter 11 proceeding into a Chapter 7 proceeding, and the parties did not comply with the terms of the settlement agreement. Furthermore, the Bankruptcy Court appointed a Trustee who abandoned the account receivable to Bank, the secured creditor.

Some fourteen months after the settlement agreement and dismissal with prejudice were filed, Bank filed a motion to intervene or in the alternative for substitution of parties, and also a motion to vacate the settlement agreement and dismissal. The Court held a hearing on the motions, and found that Bank should be permitted to intervene and be substituted as Plaintiff. Further, the Court ordered vacation of the settlement agreement, and remanded the matter to the United States Bankruptcy Court for a review of the settlement agreement between the original parties."

SUMMARY OF REASONS FOR DENYING THE WRIT

There is no conflict among the Circuits on the Questions Presented. The Tenth Circuit correctly distinguished *Bostick Foundry Co. v. Lindberg*, 797 F.2d 280 (6th Cir. 1986), cert. denied 479 U.S. 1066 (1987).

Further, Petitioner's reliance on 28 U.S.C. §1471 as distinguishing the jurisdiction between district courts and bankruptcy courts is totally misplaced, §1471 having been declared unconstitutional by this Court.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the Circuits by the Tenth Circuit's opinion correctly analyzing this case.

Petitioner argues that *Bostick Foundry Co. v. Lindberg, supra*, is controlling because the instant case is "on all fours" with *Bostick*.

Intervenor would respectfully submit the facts in this case and the facts in *Bostick* are quite clearly distinguishable, the main difference being one of Constitutional magnitude, the Fifth Amendment right to due process before one can be deprived of property. The critical difference between the cases is: in the instance case, the creditor, Intervenor, was a secured creditor with a properly perfect security interest in the subject matter of the litigation, whereas in *Bostick*, the complaining creditors apparently were general, unsecured creditors.

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) this Court states the essence of the meaning of procedural due process:

"For more than a century the central meaning of procedural due process has been clear: 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' *Baldwin v. Hale*, 68 U.S. 223. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552."

In the instant case, the district court vacated the settlement agreement and dismissal with prejudice because Intervenor had neither notice nor opportunity to be heard in a proceeding which deprived Intervenor of a vested property interest. Bankruptcy Rule 9019 allows compromise and settlement of a claim but only after a hearing on notice to creditors. Bankruptcy Rule 9019 merely codifies in a bankruptcy context the Constitutional mandate of notice and hearing before a vested property interest can be affected.

Thus, there is no conflict between the instant case and *Bostick* because in *Bostick* the general creditors had no property interest while in the instant case Intervenor was possessed of a properly perfected security interest in the very subject matter of the litigation.

2. Petitioner relies on a statute declared unconstitutional by this Court.

Petitioner contends that this Court should grant a Writ to clarify "the confusion among the courts on the ability of a defendant to counterclaim a debtor in district court, and the jurisdiction of the district court in such an instance as opposed to that of the bankruptcy court, and whether Bankruptcy Rule 9019 applies to district court judgments . . ." Petitioner cites 28 U.S.C. §1471 (bankruptcy jurisdiction) as a statutory provision involved in its Petition For Writ Of Certiorari. However, in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) this Court held that the broad jurisdiction granted to bankruptcy judges and 28 U.S.C. §1471, violated Article

III of the Constitution and was invalid. Subsequently, Congress enacted remedial legislation, repealing 28 U.S.C. §1471 and enacting 28 U.S.C. §1334 which for the most part vests original and exclusive jurisdiction of all cases under Title 11 in the district courts. Thus, Petitioner's apparent confusion regarding the jurisdiction of the district court as opposed to that of the bankruptcy court has already been resolved by the repeal of 28 U.S.C. §1471 and the enactment of 28 U.S.C. §1334.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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